

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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June 25, 2002
CODSIA Case No. 4-02

Ms. Susan L. Schneider
Defense Acquisition Regulations Council
OUSD (AT&L) DP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: DFARS Case 2002-D003, Defense Acquisition Regulation Supplement; Competition Requirements for Purchases from a Required Source

Dear Ms. Schneider:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the interim DFARS rule implementing Section 811 of the Fiscal Year 2002 Defense Authorization Act, as published in the *Federal Register* on April 26, 2002 (67 Fed. Reg. 20687). CODSIA members strongly support the adoption of this interim rule as final.

Formed in 1964 by industry associations with common interests in defense and space fields, CODSIA is currently comprised of seven associations representing over 4000 member companies across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

Section 811 requires the Department of Defense (DOD) to conduct market research before purchasing a product listed in the catalog for the Federal Prison Industries (FPI), to determine whether the FPI product is comparable in price, quality and time of delivery to products available in the private sector. If the FPI product is not comparable, DOD must use competitive procedures to acquire the product.

Background

The Federal Prison Industries (FPI) also known as UNICOR, was created in 1934 to employ federal prisoners to manufacture products exclusively for all federal agencies. But, as a mandatory source of supply, FPI has a virtual monopoly on the federal market – jeopardizing the need for the government to get the best value for its procurement needs, and the rights of law abiding businesses to bid on government procurements. The only exception to buying from the prisons is for an agency to request a waiver from FPI itself – and only FPI controls the waiver

and appeals process, thus making it virtually impossible to introduce commercial sources for selected products.

The mandatory source requirement is contrary to normally required competitive procurement practices for government contracting as well as overall government policy, which states that *"In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength."* (Section 4, Revised Office of Management Budget Circular A-76). It is also contrary to the bi-partisan congressional efforts of the last several years to encourage the adoption and use of commercial practices in the way the federal government conducts its business. These reform initiatives (e.g., the 1994 Federal Acquisition Streamlining Act, the 1996 Clinger-Cohen Act and the FAR Part 15 rewrite) have led to more performance based contracting – a concept fully supported by the Administration.

Section 811

The statute and its implementing rule make it clear that, for the Department of Defense, FPI should be allowed as a provider of goods only if it can prove that its products are the best quality, best priced, delivered in the timeliest manner and in line with its customers needs. We applaud the DAR Council in making this an interim rule, effective upon the date of publication. It is important that contracting officials within the Department of Defense receive immediate guidance to implement the statute, which is effective for all purchases initiated on or after October 1, 2001. And, we recommend that the interim rule be adopted without change.

Section 811 is compatible with the acquisition reform initiatives cited above requiring federal agencies to conduct market research, have informal discussions with industry and take similar steps to assist agencies in identifying their needs. These reform initiatives also have led to more best value and performance based contracting, the issuance of more refined statements of work, a reduction in procurement lead times, and an improvement in quality control.

This section ensures that contracting offices have the freedom to explore the market for products to see if FPI's pricing is reasonable and compares in terms of cost and quality to the private sector, or other agency providers. This applies the acquisition reform initiatives, including market research, to FPI – and by doing so FPI and the Department of Defense will benefit.

Finally, the statute and implementing regulations make it clear that a waiver (from FPI) is not required should DOD determine FPI is not comparable. The determination of comparability is "a unilateral decision made solely at the discretion of the department or agency" (e.g., the Department, Service or defense agency). Furthermore, the comparability determination is based on whether FPI can provide the product on the basis of price, quality and time of delivery. Also, it should be noted that both the statute and implementing regulations do not address the *procurement of services* by FPI because the current statute governing FPI does not give FPI authority to provide services.

Regulatory Flexibility Act

CODSIA members agree with the assessment in the rule that this will have a significant economic – and we expect, positive – impact on small businesses. This assessment, made pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), notes that small entities will be permitted to compete with FPI for DOD contract awards under certain conditions.

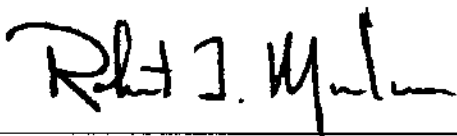
FPI's mandatory source requirement has been particularly detrimental to our nation's small businesses' ability to compete for government contracts. This rule, by essentially doing away with FPI's monopoly and by allowing DOD contracting officials to conduct market research and to determine the availability of comparable products from the private sector based on price, timely delivery and quality opens this market to the entire small business community. This encourages and promotes competition, allowing small businesses to offer products comparable to those listed in the FPI catalog to the Department of Defense.

Conclusion

To reiterate, CODSIA members strongly support the interim rule and recommend that it be made final, without change. Thank you for the opportunity to provide our comments. If there are any questions, or if we can be of assistance, please contact Cathy Garman, the CODSIA Project Officer for this case, at (703) 243-2020.

Sincerely,

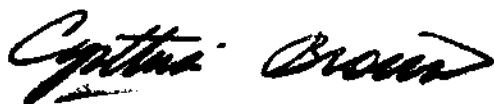
(SEE ATTACHED CODSIA SIGNATORIES)



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